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Court of Appeals Div. II No. 38744-1-II

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SUPREME COURT  
OF THE STATE OF WASHINGTON

FILED  
AUG 15 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

BARBARA STOUT. P.R. of the Estate of Larry Stout,  
Petitioner,

v.

CARL J. WARREN AND JANE DOE WARREN, *et al.*,  
Defendants

CLARANCE JOHNSON, JR., and SALLY DOE JOHNSON, husband and wife, d/b/a "CJ"  
JOHNSON BAIL BONDS  
Respondents

MIKE GOLDEN and JANE DOE GOLDEN, husband and wife, d/b/a C.C.S.R. FUGITIVE  
RECOVERY  
Defendants

SUPPLEMENTAL BRIEF OF APPELLANT

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## **I. STATEMENT OF THE CASE**

### **a. Procedural History**

The Petitioner adopts the procedural history set forth in their briefs filed in the Court of Appeals and Petition for Review. The Petitioner now submits supplemental briefing.

### **b. Facts**

The Petitioner adopts the Statement of Facts as set forth in their appellate briefs filed in the Court of Appeals and their Petition for Review filed with this court.

## **II. ARGUMENT**

- A. THE DECISION OF THE COURT OF APPEALS IMPROPERLY DENIES MR. STOUT ANY FORM OF RECOVERY DUE TO HIS PRIOR CRIMINAL HISTORY AND THEREFORE IMPROPERLY CONCLUDES THAT HE IS NOT PART OF THE "PROTECTED CLASS" AS CONTEMPLATED BY THE STATUTE.

The Respondents argue that even if the law of excessive force applies in this case, the actions taken by defendant Warren were justified under the law. Supplemental Br. of Respondent 5. However, this line of argument incorrectly blurs the common law recovery available to an individual sought by a bail recovery agent with the constitutional safeguards available to an individual sought by the police. Notably, the Respondents' argument appears to support the use of unrestricted force for any individual accused of failing to appear in court. See Supplemental Br. of Respondent 5.

The Respondent argues that *Taylor v. Tainto, Treasurer*, 83 U.S. 366, 21 L. Ed. 287 (1872) establishes the relationship and rights between a bail recovery agent

and an individual who is sought for failing to appear. However, the *Taylor* court was examining the actions that discharge an obligee of liability on a bond; here, the issue of that aspect of the relationship between bond agent and defendant was not before the court. Therefore, the language that the Respondents point to is only dicta and does not address a federal question or constitutional provision; rather, it simply relates to the law of Connecticut at that time.

Since the bond agent and defendant relationship in *Taylor* is considered dicta by many States, including Washington, and such many have declined to follow it either through directly refusing to apply it or through enactment of statute. See: *Johnson v. County of Kittitas*, 103 Wn. App 212, 11 P.3d 862 (2000) (Court of Appeals declining to apply *Taylor*, referring to it as “dicta”); *Green v. State*, 829 S.W. 2d 222 (1992) (Texas acknowledging that *Taylor* is overruled by state statute); *Oram v. The People*, \_\_\_ Co. S. Ct. \_\_\_ (2011) (Colorado declining to adopt bonding agent privilege as outlined in *Taylor*); *Walker v. Com.*, 127 S.W. 3d 596 (2004) (*Taylor* does not apply to Kentucky); *Lund v. Seneca County Sheriff's Dep't*, 230 F.3d 196 (2000) (*Taylor* does not allow bail agent to break laws of Ohio). Notably, since the date of Mr. Stout's accident, the Washington legislature enacted statutes that overrule the *Taylor* dicta. See Chapter 18.185 RCW. Therefore, *Taylor* does not offer this court any guidance and as such Washington should decline to adopt the bonding agent privilege as discussed in *Taylor*.

The Respondents also argue that citizens who create exigent circumstances have only themselves to blame for police conduct that subsequently occurs. See Supplemental Br. of Respondent 6 (referencing *Kentucky v. King*, 131 S. Ct. 625, 179

L. Ed. 2d 865 (2011)). However, this argument misstates the legal issues before this Court. This case does not deal with the relationship between the State and a private citizen, but rather it is an issue between two private citizens. The true legal issue is whether Washington's common law places any restraints on a bail agent or whether it simply endorses a form of vigilante justice instead.

The Respondents argue that this case is analogous to *Scott v. Harris*, 530 U.S. 372, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007), which upheld summary judgment in favor of a police officer who ran a fleeing felon off the road while in hot-pursuit. However, this case is simply not on point because it deals with the interaction between the State and a fleeing felon, not two private citizens as is before this Court here.

Even if the Court were to ignore that *Harris* is not applicable to the current case, the factual differences between the cases also make Respondents' arguments on the subject moot. *Harris* involved a situation with "multiple police cars, with blue lights flashing and sirens blaring...chasing respondent for nearly 10 miles." *Harris*, 530 U.S. at 384. The *Harris* court could not reasonably infer that Harris was unaware of the situation he was creating. However, when examining the disputed facts in the current case and looking at them in a light most favorable to Mr. Stout it is reasonable to conclude that Mr. Stout was unaware of what was occurring and as such Defendant Warren's actions were not a reasonable response to the situation.

On July 16, 2002, Defendant Warren learned Stout would be in a certain area in Tacoma within the next 30 minutes. CP 46. Defendant Warren drove to that location in his own car. CP 3. For some unknown reason Warren declined to

contact law enforcement to aid in Stout's apprehension and opted to try to capture Stout on his own. Clearly this accident could have been avoided had properly identified law enforcement officers and vehicles taken part in the recovery. Instead of requesting assistance, Warren positioned his partner, Jason Ferrell, "in the trees" across from his own position in a nearby driveway, where both lay in wait for Stout to drive by on a private gravel roadway. CP 46. Stout noticed another vehicle approaching him, rapidly accelerating. CP 2, 30. Fearing a collision, Stout also accelerated. CP 30. Despite Stout's efforts to avert a collision, the approaching vehicle rammed into Stout's vehicle, causing it to collide head-on into a tree. CP 3, 30. These facts could not be further from the facts in *Harris*.

Taking the facts in a light most favorable to Mr. Stout, it is clear that he was unaware of the situation that Defendant Warren was creating through his reckless actions. To hold that Mr. Stout assumed all risk of being sought for failing to appear is akin to saying that an individual's criminal status deprives them of all common law forms of recovery regardless of the specific facts creating the harm.

### III. FUGITIVE RECOVERY IS AN INHERENTLY DANGEROUS ACTIVITY.

Mr. Stout adopts his prior arguments regarding the inherently dangerous nature of fugitive recovery as set forth in his briefs filed in the Court of Appeals and in his Petition for Review filed with this Court.

The Respondents argue that in order for an activity to be deemed "inherently dangerous" it must be such that it can never be performed safely. *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 941, 29 P.3d 50 (2001). This is the correct legal

principal, however the Respondents' application of this principal to their argument is flawed. In fugitive recovery work, just as in dynamite blasting work or transportation of hazardous waste, it is possible to complete the task without injury to any party. See *Andrews v. Del Guzzi*, 56 Wn.2d 381 (Wash. 1960); *Tauscher v. Puget Sound Power and Light Co.*, 96 Wn. 2d 274, 635 P. 2d 426 (1981). Therefore, just because it is possible to safely complete an activity on a given occasion by using proper precautions it does not equate to saying that the activity is no longer inherently and intrinsically dangerous; such an argument would completely trivialize the "inherently dangerous" provision of the law.

Contrary to the Respondents' argument, Mr. Stout has established a principal/agent relationship between "CJ Johnson Bail Bonds," Defendant Golden and Defendant Warren. CJ Johnson Bail Bonds agreed to provide Mr. Stout bail. When Mr. Stout failed to appear in court, CJ Johnson subcontracted with Defendant Golden to recover Mr. Stout. Defendant Golden in turn subcontracted with Defendant Warren. CP 160-162. Mr. Stout had no contractual relationship with either Defendant Golden or Warren.


The record clearly show that following the accident, Warren himself told police officers that he was an employee of CJ Bail Bonds and later in his incident report Warren claimed to be an employee of C.C.S.R. Fugitive Recovery (Defendant Golden) CP 46. Defendant Johnson paid Defendant Golden who in turn paid Defendant Warren fees for the apprehension of Mr. Stout. CP 161, CP 164-165. The facts clearly establish contractual relationships between all of the defendants.

For all the reasons stated above, and in the briefs previously filed, this Court should reverse the Court of Appeals and hold that Mr. Stout's status as a criminal does not preclude him from recovering for his damages and that fugitive recovery is an inherently dangerous activity in Washington and as such summary judgment is improper.

#### **IV. CONCLUSION**

Based on the briefs and records before this Court, the Appellant respectfully requests that the Court reverse the Court of Appeals and Trial Court's decision granting summary judgment.

DATED this 15 day of August, 2011.

  
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